

Marquette University Law School Marquette Law Scholarly Commons

Faculty Publications

Faculty Scholarship

1-1-2009

Family Law for the Underclass: Underscoring Law's Ideological Function

David Ray Papke

Marquette University Law School, david.papke@marquette.edu

Follow this and additional works at: <http://scholarship.law.marquette.edu/facpub>



Part of the [Law Commons](#)

Publication Information

David Ray Papke, Family Law for the Underclass: Underscoring Law's Ideological Function, 42 Ind. L. Rev. 583 (2009). Copyright 2009, The Trustees of Indiana University. Reprinted with permission of the Indiana Law Review.

Repository Citation

Papke, David Ray, "Family Law for the Underclass: Underscoring Law's Ideological Function" (2009). *Faculty Publications*. Paper 185.
<http://scholarship.law.marquette.edu/facpub/185>

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

FAMILY LAW FOR THE UNDERCLASS: UNDERSCORING LAW'S IDEOLOGICAL FUNCTION

DAVID RAY PAPKE*

It is challenging to discuss the relationship of socioeconomic class to family law and to the law in general. Against the backdrop of a dominant culture that valorizes individualism, traditional American legal thought has routinely assumed significant degrees of choice and volition and called for laws and legal processes able to accommodate free-willed decisionmaking. “[I]f there is a single leitmotif of modern law, whether civil rights law, commercial law, family law, or the law of landlord and tenant,” the legal historian Lawrence Friedman observed, “it is an extreme emphasis on the *individual*, and on individual choice or consent; the whole system turns on this point.”¹ In the contemporary legal academy, those interdisciplinary and theoretical approaches most receptive to presumptions of individual choice, for example, “law and economics,” have been more likely to thrive than approaches that rely on class or even gender.² Champions of “law and economics” enthusiastically contemplate the workings of markets, both real and imaginary, often formulaically conjuring up the image of individual maximizers of self-interest.

In scholarship speaking of socioeconomic class, by contrast, the individual ceases to be the leitmotif and questions of the individual’s self-maximizing choices leave center-stage. Differences among individuals are of course recognized, but the focal point for commentary and analysis is more social and collective. The underlying assumption is that class affiliation strongly affects one’s choices in life and also one’s interaction with the law and legal processes.

Surely that is the case for members of the underclass. In the contemporary United States, 10-12% of the adult population belongs to a sub-working class.³ This underclass is disproportionately African American, but it also includes Latinos, Native Americans, and Caucasians. The Caucasian members of the underclass, Christopher Jencks reminds us, can be easily overlooked.⁴ Caucasian

* Professor of Law, Marquette University Law School. A.B., Harvard College; J.D., Yale Law School; Ph.D. in American Studies, University of Michigan. The author thanks Richard Delgado, Edward Fallone, Lisa Ikemoto, Elise Papke, and Jessica Slavin for critical readings of earlier versions of this Article and Martin Price, Marquette University Law School Class of ’08, for valuable research assistance.

1. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1585 (1989).

2. In launching a new law and humanities journal, a miffed Owen Fiss noted that law and economics had become “the interdisciplinary method for studying law.” Owen M. Fiss, *The Challenge Ahead*, 1 YALE J.L. & HUMAN., at viii, ix (1988-89).

3. The Eisenhower Foundation estimated in 2008 that 37 million Americans lived in poverty and the proportion of the poor below half the poverty line had grown from 30% in 1975 to 43% in 2006. The child poverty rate increased from 15% in 1968 to 17% in 2006. EISENHOWER FOUND., WHAT TOGETHER WE CAN DO: A FORTY YEAR UPDATE OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 3 (2008), available at <http://www.eisenhowerfoundation.org/kerner.php>.

4. See CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE

members of the underclass make up only a small percentage of the whole Caucasian population and infrequently constitute a majority in a residential neighborhood, but non-Caucasian members of the underclass make up substantial percentages of minority populations and more frequently constitute majorities in given neighborhoods.⁵ Regardless of race and ethnicity, members of the underclass receive or have received welfare in the past. They lack regular employment or have dropped completely out of the labor market. Underclass Americans frequently lead lives of semi-permanent poverty and debilitating transience, and if they experience any degree of “upward mobility,” it is commonly to only the lower rungs of the working class.⁶

After an initial section outlining in more detail my understanding of class, the underclass, and ideology, this Article focuses on the relationship of the underclass and family law. The second section explores the underclass’s relationship to marriage law, emphasizing programs to get the underclass to marry. The third section addresses issues of child support, critically examining the range of state and federal laws designed to extract support from delinquent payors, a large percentage of whom belong to the underclass. The final section of the Article turns to adoption, and it highlights the role of underclass women as “suppliers” in adoption and the ways legal standards and procedures strongly favor adoptive parents over biological ones.

Family law in these areas functions more or less successfully to support social institutions thought to be desirable, to enforce individual obligations and responsibilities, and to foster the well-being of children. However, family law for the underclass additionally assumes a distinctly ideological function. In particular, it condemns the underclass. This ideological stance is evident in selected family law statutes and appellate opinions, and it also emerges in the policy thinking and political preferences that buoy the statutes and opinions. Family law as ideology also intersects with other varieties of ideology in the form of religious sermons, political rhetoric, and even popular culture such as movies and television programming. The ideology suggests the underclass does not comport itself with the norms of the middle and upper classes and, therefore, lives its collective life improperly.

I. AN INTRODUCTION TO CLASS ANALYSIS AND THE NOTION OF AN “UNDERCLASS”

Even a casual observer would recognize that a class analysis has traditionally been suspect in American legal and political discourse. The chief reason for the suspicion is the linkage of class analysis to Marxism and to Communism.

UNDERCLASS 145 (1992).

5. *See id.*

6. *See* Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879, 900-01 (2007) (“Recent studies show that the United States has one of the lowest rates of upward mobility in the developed world and that few citizens leave the class into which they are born for a higher one.”).

Indeed, Karl Marx and his collaborator Friedrich Engels claimed in the *Communist Manifesto* that “The history of all hitherto existing society is the history of class struggles.”⁷ Marx and Engels also asserted that class was a uniquely prominent feature of any capitalist society.⁸ They did not have the United States primarily in mind, but if Marx and Engels were alive today, they would recognize the United States as the world’s leading capitalist country and presumably be inclined to underscore its immense class-based inequalities.

However, there is no reason that a law-related class analysis need be Marxian. Other social theorists and sociologists have discussed and critiqued socioeconomic class for almost two centuries, and many have not divided modern society into two great classes—the proletariat and the bourgeoisie—as Marx did. Different societies and different epochs have different class structures. In the contemporary United States, the white-collar middle class is larger than the traditional blue-collar class of manual workers, and scholars have even suggested that the burgeoning middle class is the key to the American economy.⁹ “[I]t is misleading in itself to treat white-collar labor as an undifferentiated category, and the overall expansion of the white-collar sector in capitalist societies conceals differential rates of growth in various occupational subcategories.”¹⁰ Furthermore, middle-class subcategories are themselves hierarchically arranged. One might rank the major subcategories of the white-collar middle class in order as follows: professional and managerial workers, small businessmen, technical and support workers, and clericals. Clericals have experienced a relative loss of income and status within the white-collar middle class, and some clericals now have less job security than members of the ever-shrinking blue-collar working class.¹¹

Class structures are not only variable among societies and across time but are also permeable and shifting. Depending on the nature and rigidity of the class structure, some number of individuals might move from one class to another. Often these individuals are temporarily accommodated by intermediate and transitional strata, for example, upwardly mobile student populations. In some cases whole occupations assume new locations in the overall class structure. Secretaries, for example, had higher social standing a century ago than they do today.¹² Class systems are dynamic, both for individuals and groups.

In general, a class in a capitalist society is a group of people with comparable

7. KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 9 (1948).

8. See A DICTIONARY OF MARXIST THOUGHT 75 (Tom Bottomore ed., 2d ed. 1983).

9. See JOSEPH BENSMAN & ARTHUR J. VIDICH, *THE NEW AMERICAN SOCIETY: THE REVOLUTION OF THE MIDDLE CLASS* 15-16 (1971).

10. Anthony Giddens, *The Growth of the New Middle Class*, in *THE NEW MIDDLE CLASSES: LIFE-STYLES, STATUS CLAIMS AND POLITICAL ORIENTATIONS* 105 (Arthur J. Vidich ed., 1995).

11. See *id.* at 106.

12. The decline in status for secretaries occurred as men relinquished the occupation to women. See International Association of Administrative Professionals, *History of the Secretarial Profession*, <http://www.iaap-hq.org/researchtrends/history.htm> (last visited June 7, 2009).

assets, employment, and market relations.¹³ Members of a class can anticipate similar overall societal standing and remuneration. One's class affiliation is an important factor in one's living conditions, life experiences, and economic opportunities.

Such opportunities are limited for members of the "underclass," a second stopping point in this introductory discussion. European social critics reaching back to Marx have commented on this social configuration,¹⁴ but the notion of an underclass seems to have truly caught hold in the United States in the 1970s. In particular, American journalists began to write about the underclass. A featured article published in *Time* in 1977 included pictures of drug-users, defiant young men, pregnant teenagers, and children playing on dirty streets—virtually displaying the underclass as if it was in a museum or a zoo.¹⁵ The article described the underclass's social environment as "a different world, a place of pock-marked streets, gutted tenements and broken hopes."¹⁶ The underclass, the article continued, was "a large group of people who are more intractable, more socially alien and more hostile than almost anyone imagined."¹⁷

Similar articles continued to appear throughout the 1980s, and some fed into the inclination of conservative politicians to criticize inner-city Americans for their laziness and social pathology. In a 1987 *Fortune* article, *America's Underclass: What to Do?*, Myron Magnet argued underclass Americans were recognizable through "not so much their poverty or race as their behavior—the chronic lawlessness, drug use, out-of-wedlock births, nonwork, welfare dependency, and school failure."¹⁸ "Underclass' describes a state of mind and a way of life," Magnet asserted. "It is at least as much a cultural as an economic condition."¹⁹ Magnet then employed a "law and economics" analysis:

Economists have a vision of man as a rational calculator, scurrying

13. In pointing to considerations in addition to the capital/wage-labor relation, my rough definition of class draws as much from Max Weber's theoretical writings as it does from Karl Marx's polemics. For a thoughtful comparison of Weber and Marx on the topic of "class," see Anthony Giddens, *Marx and Weber: Problems of Class Structure*, in *SOCIAL CLASS AND STRATIFICATION: CLASSIC STATEMENTS AND THEORETICAL DEBATES* 114-18 (Rhonda F. Levine ed., 1998) [hereinafter *SOCIAL CLASS AND STRATIFICATION*].

14. Marx referred briefly in his writings to a "lumpenproletariat," a group of vagabonds and petty criminals. See, e.g., Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, in *MARX & ENGELS: BASIC WRITINGS ON POLITICS AND PHILOSOPHY* 320, 345-48 (Lewis S. Feuer ed., 1959) [hereinafter *MARX & ENGELS*]. In *Manifesto of the Communist Party*, Marx describes the lumpenproletariat as "social scum, that passively rotting mass thrown off by the lowest layers of old society." Karl Marx, *Manifesto of the Communist Party*, in *MARX & ENGELS, supra*, at 6, 18.

15. *The American Underclass—Destitute and Desperate in the Land of Plenty*, *TIME*, Aug. 29, 1977, at 14-27.

16. *Id.* at 14.

17. *Id.*

18. Myron Magnet, *America's Underclass: What to Do?*, *FORTUNE*, May 11, 1987, at 130.

19. *Id.*

among available options maximizing gain, driven hither and yon by this incentive or that disincentive. This way of thinking, to be sure, has a real usefulness in grappling with the underclass problem. Where incentives for failure exist—welfare and the unwillingness to punish criminals are the luminous two cases in point—then of course the community has to change the calculus.²⁰

Troubled by the increasingly hostile alignment of this journalism, prominent contemporary sociologist William Julius Wilson critiqued it sharply.²¹ Wilson had earlier attempted to place the American underclass in historical context.²² The American underclass, Wilson thought, was a relatively modern phenomenon that derived from post-World War II changes in the economy.²³ In essence, the labor market grew increasingly segmented, and access to good jobs and personal wealth came to depend on educational criteria.²⁴ Poorly trained and educated, the underclass constituted “the very bottom of the economic hierarchy and not only includes those lower-class workers whose income falls below the poverty level but also the more or less permanent welfare recipients, the long-term unemployed, and those who have dropped out of the labor market.”²⁵

Wilson has backed off the term “underclass” in his own scholarship, fearing that it is a convenient tool for those who want to speak of the sub-working class pejoratively and to condemn it for its misconduct.²⁶ Wilson’s fears about the term are understandable, but the term is still useful, if only to denote a class worse off than the regularly employed working class.

Before abandoning the term “underclass,” Wilson argued that the fundamental dilemma facing the underclass was “joblessness reinforced by an increasing social isolation in an impoverished neighborhood.”²⁷ In other words, beyond merely lacking jobs and legitimate economic opportunities, members of the underclass, in Wilson’s conceptualization, also lacked community safeguards and supports.²⁸ This is an extremely debilitating situation. Members of the underclass might with good reason experience frustration, boredom, and

20. *Id.* at 140.

21. See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 171-82 (1996) [hereinafter WILSON, *WHEN WORK DISAPPEARS*].

22. See WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS*, at xi (2d ed. 1980) [hereinafter WILSON, *THE DECLINING SIGNIFICANCE OF RACE*].

23. *Id.* at 92-93.

24. *Id.* at 94-95.

25. *Id.* at 156.

26. For a discussion of Wilson’s disavowal of the term “underclass,” see Bill E. Lawson, *Meditations on Integration*, in *THE UNDERCLASS QUESTION* 6 (Bill E. Lawson ed., 1992).

27. William Julius Wilson, *The Underclass: Issues, Perspectives, and Public Policy*, in *THE GHETTO UNDERCLASS: SOCIAL SCIENCE PERSPECTIVES* 20 (William Julius Wilson ed., 1993) [hereinafter Wilson, *The Underclass*].

28. See *id.*

alienation. Additionally, members of the underclass may manifest criminal behavior and other social pathologies.

From the perspective of the superior working, middle, and upper classes, the ongoing presence of an underclass is an intractable problem. In a Marxian understanding of class relations, there is an “*antagonistic interdependence of material interests* of actors within economic relations.”²⁹ More specifically, the material welfare of the more powerful classes depends on the material deprivations of the less powerful classes.³⁰ The dominant classes appropriate the fruits of the labor of the exploited.³¹ “This dependency of the exploiter on the exploited gives the exploited a certain [form] of power, since human beings always retain at least some minimal control over their own expenditure of effort.”³² Exploiters would like the exploited to cooperate, and in order to obtain that cooperation, exploiters sometimes moderate their demands. “Paradoxically perhaps, exploitation is thus a constraining force on the practices of the exploiter. This constraint constitutes a basis of power for the exploited.”³³

How does one exploit an isolated, debilitated underclass? Members of the underclass do not necessarily sell their labor in sustained ways for crucial purposes, and, as a result, the fruits of their labor cannot be appropriated.³⁴ “The situation is similar to a capitalist owning outmoded machines. While the capitalist physically controls these pieces of machinery, they cease to be ‘capital’—a capitalistically productive asset—if they cannot be deployed within a capitalist production process profitably.”³⁵ Members of the more powerful classes do not for the most part become angry with their outmoded machinery, but they do sometimes grow irritated with the underclass:

The material interests of the wealthy and privileged segments of American society would be better served if these people simply disappeared. However, unlike in the nineteenth century, the moral and political forces are such that direct genocide is no longer a viable strategy. The alternative, then, is to build prisons and to cordon off the zones of cities in which the underclass lives.³⁶

Short of incarceration and residential segregation, the middle and upper classes can exercise some degree of control over the underclass through its rhetoric. If the underclass cannot truly be changed, at least its members can be criticized, deplored, and set clearly outside the mainstream. Pronouncements of this sort are ideological, “ideology” standing not for falsehood but rather the

29. Erik Olin Wright, *Class Analysis*, in *SOCIAL CLASS AND STRATIFICATION*, *supra* note 13, at 141.

30. *Id.*

31. *Id.* at 142.

32. *Id.* at 143.

33. *Id.*

34. *See id.* at 153.

35. *Id.* at 152-53.

36. *Id.* at 153.

normative ideas and attitudes of a given social group or coalition of groups.³⁷ “Ideologues” who would denigrate the underclass could speak not only through conventional political speeches and writings but also through law, religion, philosophy, and even aesthetics.³⁸ In the contemporary setting, as a later section of this Article will illustrate, popular culture in the form of movies and television programming also sometimes ridicules and condemns the underclass.

Often, the underclass is in a poor position to complain. Modern-day American “welfare reform” glorifies wage relations in a market economy, but members of the underclass, lacking strong wage relations, cannot for the most part effectively complain to employers. In the political arena, members of the underclass are severely alienated and often do not make their way to the polls. This reduces their leverage with politicians and elected officials. Overall, a striking degree of economic and political powerlessness is evident within the underclass, and the underclass is a sector of society especially vulnerable to the buffeting of ideology.

II. MARRIAGE LAW

Although annulments, ante-nuptial agreements, and the possibility of same-sex unions are important for members of the middle and upper classes, these mainstream marriage law concerns have appreciably less urgency for the underclass. The chief reason is that members of the underclass do not seek to marry or actually marry as frequently as members of the middle and upper classes.³⁹ During most of the twentieth century Americans of all classes married at roughly the same rate,⁴⁰ but the incidence of decline of underclass marriage began to manifest in the 1970s.⁴¹ By the end of the 1980s, poor women were only three-quarters as likely to marry as middle and upper-class women.⁴² In the two decades since, the contrast has grown even more striking, and as of 2005 poor men and women were only one-half as likely to marry as men and women with incomes at least three times the poverty level.⁴³ Variations exist according to region, ethnicity, and race, but “[t]he emerging gulf is instead one of class—what demographers, sociologists, and those who study the often depressing statistics about the wedded state call a ‘marriage gap’ between the well-off and the less so.”⁴⁴ Law as a social instrument *and* as a refined

37. See RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 53-57 (2d ed. 1983).

38. See *id.* at 54.

39. See Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 *THE FUTURE OF CHILDREN*, Fall 2005, at 117, 118.

40. See *id.*

41. Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 *FAM. L.Q.* 567, 570-71 (2007).

42. *Id.* at 571.

43. See Edin & Reed, *supra* note 39, at 118.

44. See Kate Zernike, *Why Are There So Many Single Americans?*, *N.Y. TIMES*, Jan. 21,

ideological pronouncement would like to narrow the gap.

Why are members of the contemporary underclass less likely to marry? Some religious, pro-family groups point to the underclass's lack of respect for the sacred institution of marriage and to the underclass's general moral disarray, but scholars point to less normative and more substantive factors. As early as 1981, for example, the scholar Gary S. Becker argued forcefully that with women's entry into the labor force and rise in income relative to men's income, women no longer needed to marry and could remain single if they wished.⁴⁵ Underclass women, in particular, are more likely to be employed than underclass men, and even their border-line financial independence makes it more likely that they will live their lives without husbands.⁴⁶ William Julius Wilson, by contrast, pointed primarily to the declining number of "marriageable" men in the inner-city.⁴⁷ He argues that "the sharp increase in black male joblessness since 1970 accounts in large measure for the rise in the rate of single-parent families, and that because jobless rates are highest in the inner-city ghetto, rates of single parenthood are also highest there."⁴⁸ Wilson's theory is that, against the backdrop of deindustrialization, inner-city men have declining or non-existent wages, and inner-city women have less interest in drawing from the pool of potential husbands.⁴⁹ Kathryn Edin and Maria Kefalas add that a culture-wide redefinition of marriage has occurred since the 1950s.⁵⁰ The standards for marriage have risen, and sex and childbearing have been decoupled from marriage.⁵¹ Members of the underclass share these new attitudes with members of the middle and upper classes, but the difference is that members of the underclass are less likely to reach what Edin and Kefalas call the "white picket fence dream."⁵²

Edin also participated in a particularly thoughtful recent study of the underclass's low marriage rates with Christina M. Gibson-Davis and Sara McLanahan.⁵³ These scholars began with data from the *Fragile Families and Child Well-being Study*, a nationally representative study of 3700 unmarried

2007, at 4-1.

45. See GARY S. BECKER, A TREATISE ON THE FAMILY 14-37 (1981). For a challenge to Becker's thesis, see generally Valerie Kincade Oppenheimer, *Women's Rising Employment and the Future of the Family in Industrial Societies*, 20 POPULATION & DEV. REV. 293 (1994).

46. See Bureau of Labor Statistics, Economic Situation Summary, <http://www.bls.gov/news.release/emp/sit.nr0.htm> (last visited June 7, 2009).

47. WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 91 (1987) [hereinafter WILSON, THE TRULY DISADVANTAGED].

48. WILSON, WHEN WORK DISAPPEARS, *supra* note 21, at 94-95.

49. See WILSON, THE TRULY DISADVANTAGED, *supra* note 47, at 91.

50. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 201 (2005).

51. See *id.*

52. *Id.* at 202.

53. Christina M. Gibson-Davis, Kathryn Edin & Sara McLanahan, *High Hopes but Even Higher Expectations: The Retreat from Marriage Among Low-Income Couples*, 67 J. MARRIAGE & FAM. 1301 (2005).

couples with newborns and a comparison sample of 1200 married couples with newborns.⁵⁴ They then extended the data with their *Time, Love, Cash, Caring and Children Study*, an embedded, qualitative, interview-based study of forty-nine “fragile families” and twenty-six married couples.⁵⁵ The “fragile family” sample was limited to English-speaking parents whose household incomes were less than \$30,000 or who used Medicaid to pay for the birth of their children.⁵⁶ The core sample, in other words, consisted largely of unmarried underclass men and women who had recently become parents.

Gibson-Davis, Edin, and McLanahan concluded that financial stability was by far the most common barrier to marriage.⁵⁷ The overwhelming number of interviewees said they wanted to get their finances in order before getting married.⁵⁸ This included the ability to regularly make ends meet, the acquisition of suitable semi-permanent assets, the development of prudent asset-management skills, and the accumulation of enough savings to have a proper wedding.⁵⁹ The latter goal, although not necessarily the key financial concern, intriguingly suggests that while members of the underclass may not marry as frequently as members of the more prosperous classes, members of the underclass *do* believe in marriage and consider it an important and desirable undertaking. Members of the underclass could modestly and inexpensively marry before magistrates and justices of the peace, but most want something fancier and more expensive.⁶⁰ “Though these expectations may seem impractical,” Gibson-Davis, Edin, and McLanahan say, “we believe that they reflect the idea among low-income parents that getting married should signal that the couple has ‘arrived’ in a financial sense.”⁶¹

Underclass couples also cited the quality of relationships and the undesirability of divorce as barriers of sorts to marriage.⁶² Unmarried couples frequently say they want to know more about one another and whether their relationship is strong enough before committing to marriage.⁶³ The articulation of terms for marriage dissolution in an ante-nuptial agreement is not an issue because most underclass couples do not think marriage should be a short-term matter.⁶⁴ In a related vein, many members of the underclass believe that “divorce ought not to be an option.”⁶⁵ Jokes about “starter marriages” do not play as well with unmarried underclass couples as they do with members of the middle and

54. *Id.* at 1301.

55. *Id.*

56. *Id.* at 1304.

57. *Id.* at 1307.

58. *Id.*

59. *Id.* at 1307-08.

60. *Id.* at 1308.

61. *Id.*

62. *Id.* at 1307.

63. *Id.* at 1308-09.

64. *See id.* at 1309.

65. *Id.*

upper classes.

This is not to say that law related to marriage has no relevance to members of the underclass. Annulments, ante-nuptial agreements, and the substantive and procedural laws of marriage are of lesser importance to the underclass, but members of the underclass might be aware of the marriage promotion laws that have been enacted in recent years. The religious and fiscal conservatives who run the programs established under these laws frequently target the underclass. The marriage promotion programs are examples of family law attempting to perform a “channeling function,” that is, directing people toward preferred relationships and institutions.⁶⁶

The promotion of marriage by governmental officials began in a sense with the complaints and pronouncements of then Vice President Dan Quayle in 1992.⁶⁷ In a speech to the Commonwealth Club of California, Quayle surprisingly cited unwed motherhood as a contributing factor to the riots that occurred in Los Angeles earlier in the year.⁶⁸ More surprisingly, he even criticized the sit-com character Murphy Brown, a fictional news anchorwoman played by actress Candace Bergen.⁶⁹ Brown wanted to have a baby but also remain single. Quayle complained: “It doesn’t help matters when prime time TV has Murphy Brown—a character who supposedly epitomizes today’s intelligent, highly paid, professional woman—mocking the importance of fathers, by bearing a child alone and calling it just another ‘lifestyle choice.’”⁷⁰ Instead of delivering messages of this sort, Quayle thought, we should be promoting marriage and teaching Americans how to sustain their marriages.

The liberal media ridiculed Quayle for picking a fight with a fictional character,⁷¹ and he and his running mate George H. Bush lost their bid for reelection. Nevertheless, marriage promotion remained available as something to champion for politicians of many stripes. In the mid-1990s, for example, Congress approved and President William Clinton signed into law massive changes in the welfare system.⁷² A later section of this Article discusses this welfare reform at greater length, but relevant at this point are the ways governmental leaders linked welfare reform to marriage. The welfare reform statute itself begins with ten congressional findings, and the first two concern marriage. The statute tells us directly that “[m]arriage is the foundation of a

66. Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992).

67. See Vice President Dan Quayle, Address to the Commonwealth Club of California (May 19, 1992) (transcript available at <https://www.commonwealthclub.org/archive/20thcentury/92-05quayle-speech.html>).

68. *Id.*

69. See Sophronia Scott Gregory, *Dan Quayle v. Murphy Brown, the Vice President Takes on a TV Character over “Family Values,”* TIME, June 1, 1992, at 20; Quayle, *supra* note 67.

70. See Quayle, *supra* note 67.

71. Who Hijacked Our Country, http://whohijackedourcountry.blogspot.com/2008_09_01_archive.html (Sept. 2, 2008, 12:14 a.m.).

72. See 42 U.S.C. §§ 601-616 (2006).

successful society”⁷³ and also that “[m]arriage is an essential institution of a successful society which promotes the interests of children.”⁷⁴ This endorsement of marriage had obvious appeal for members of pro-family and religious groups battling in the curious trenches of the culture wars.⁷⁵

When George W. Bush moved into the White House in 2001, marriage promotion became one of the ways he could project his preferred image as a “compassionate conservative.”⁷⁶ Referring back to the “findings” made in conjunction with welfare reform, the Bush Administration seized upon marriage promotion as the next stage of welfare.⁷⁷ Once people had been removed from welfare, the argument went, marriage could be a way for former welfare recipients to become productive members of society and to achieve financial security.

The Deficit Reduction Act of 2005 created “The Healthy Marriage Initiative” and made funding of \$150 million available for each of the fiscal years 2006 through 2010 for marriage promotion programs and activities.⁷⁸ What from the Bush Administration’s perspective was a “healthy marriage”? “There are at least two characteristics that all healthy marriages have in common. First, they are mutually enriching, and second, both spouses have a deep respect for each other.”⁷⁹ “We don’t want to come in with a heavy hand,” said Dr. Wade F. Horn, Assistant Secretary of Health and Human Services for Children and Families.⁸⁰ “We want to help couples, especially low-income couples, manage conflict in healthy ways.”⁸¹

The federal “Healthy Marriage Initiative” dovetailed with programs that preceded it in individual states, and it also led to new ventures. Oklahoma, for example, had mounted programs even before the federal initiative, and the so-called “Oklahoma Marriage Initiative” became the first statewide initiative.⁸² It

73. H.R. 3734, 104th Cong. § 101(1) (enacted).

74. *Id.* § 101(2).

75. “Many saw (and still do see) welfare reform as part of a moral crusade; a moral crusade against those evils of promiscuity, ‘illegitimacy,’ single mother-headed households, and so on.” Barbara Ehrenreich, *TANF, or “Torture and Abuse of Needy Families” Top Ten Misconceptions About TANF*, 1 SEATTLE J. FOR SOC. JUST. 419, 423 (2002).

76. See Robert Pear & Daniel D. Kirkpatrick, *Bush Plans \$1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES, Jan. 14, 2004, at A1.

77. See Monica Davey, *Promoting Marriage Becomes Major Phase of Welfare Reform*, INDIANAPOLIS STAR, Dec. 2, 2001, at A12.

78. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 104 Stat. 4 (2006) (codified as amended at 42 U.S.C. § 603(a)(2)(D) (2006)).

79. U.S. Dep’t Health & Human Servs., The Healthy Marriage Initiative (HMI) General Information, <http://www.acf.hhs.gov/healthymarriage/about/mission.html> (last visited June 10, 2009).

80. Pear & Kirkpatrick, *supra* note 76.

81. *Id.*

82. See The Oklahoma Marriage Initiative, <http://www.okmarriage.org/> (last visited May 7, 2009).

has used \$10 million in federal monies to create a marriage resource center and to mount youth outreach campaigns, school-based programs, and community workshops.⁸³ Most marriage initiatives are local, but groups and individuals have also designed programs such as the Hispanic Healthy Marriage Initiative, the Native American Healthy Marriage Initiative, and the African American Healthy Marriage Initiative for members of minority groups regardless of their residence.⁸⁴ In hopes of promoting marriage among African Americans, the African American Marriage Initiative has recalled slaves' determination to marry even though antebellum law precluded it. In some areas, slaves unofficially married by jumping over a broom.⁸⁵ The modern-day African American Marriage Initiative distributes a "Jump the Broom" video as part of its marriage promotion program.⁸⁶

Of particular interest for purposes of this Article are marriage promotion programs specifically designed for the underclass. Champions of marriage have realized that programs designed with white, middle-class, well-educated couples in mind might not work as well for members of the underclass.⁸⁷ Hence, a program such as "Loving Couples Loving Children" uses a television "talk show" format in which couples discuss their relationships in front of a lively audience.⁸⁸ Fortunately, the tone is closer to "Oprah" than to "Jerry Springer." "Love's Cradle," another marriage promotion program designed for the underclass self-consciously "dumbs down" the presentation. It pitches to a fifth-grade educational level,⁸⁹ apparently never stopping to realize how insulting it might be to even poorly educated people.

Anticipating criticism, proponents of marriage promotion denied any sinister motives or agendas. Wade F. Horn, for example, insisted that assorted marriage initiatives would not force anyone to get or stay married.⁹⁰ Indeed, it does not appear that marriage promotion programs have led many members of the underclass to marry, even though some of the programs have gone so far as to offer bonuses for those who marry.⁹¹ "Very little research exists to show that

83. See Teresa Kominos, Comment, *What Do Marriage and Welfare Reform Really Have in Common? A Look into TANF Marriage Promotion Programs*, 21 ST. JOHN'S J. LEGAL COMMENT. 915, 928-29 (2006-07).

84. For information regarding these healthy marriage initiatives as well as others, see U.S. Dep't Health & Human Servs., Healthy Marriage Initiatives, <http://www.acf.hhs.gov/healthymarriage/index.html> (last visited May 18, 2009).

85. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 475 (1976).

86. See African American Healthy Marriage Initiative, *Jump the Broom*, <http://www.aahmi.net/files/jumpthebroom.html> (last visited May 7, 2009).

87. See M. Robin Dion, *Healthy Marriage Programs: Learning What Works*, 15 THE FUTURE OF CHILDREN 139, 144 (Fall 2005).

88. *Id.* at 146.

89. *Id.*

90. See Pear & Kirkpatrick, *supra* note 76.

91. See Wendy Sigle-Rushton & Sara McLanahan, *For Richer or Poorer? Marriage as an*

marriage promotion programs are effective in creating marriages among low-income families.”⁹²

Family law, in other words, does not effectively “channel” members of the underclass into marriage.⁹³ Put differently, it does not effectively route the underclass to an institution the dominant classes take to be desirable.

In addition, as it applies to the underclass, marriage promotion embodies policy thinking that is naïve and borders on duplicitous. If members of the underclass would only marry, the thinking goes, they would be much more able to support themselves without government assistance. If the poor had two-parent households, they could in fact lift themselves out of poverty.

As Teresa Kominos bluntly stated with reference to this kind of thinking, “While marriage, in and of itself may be a desirable goal for many members of the community, it is not a solution to poverty”⁹⁴ Because Americans tend increasingly to marry within class,⁹⁵ we can assume that almost all members of the underclass who marry do marry other members of the underclass. The coupling of two impoverished people is unlikely to lift them from impoverishment. In the present economic setting, the possible husband is especially likely to be unemployed and, as a result, to be a “bread-eater” rather than a breadwinner.⁹⁶ Underclass women might also conclude that those underclass men with violent tendencies, criminal records, or children with other underclass women are lousy marital timber. One careful study used data from the *Fragile Families and Child Well-Being Study* to project the earnings and earning potential of unwed underclass parents if they were married; it concluded that much of the economic differential between married couples and unmarried parents can be attributed to factors other than marital status such as unemployment.⁹⁷ As a result, “[p]roponents of marriage are substantially overstating its benefits when they compare the earnings or poverty rates of single mother families to those of married, two-parent families.”⁹⁸

Anti-Poverty Strategy in the United States, 57 POPULATION 509, 512 (2002).

92. Julia M. Fisher, *Marriage Promotion Policies and the Working Poor: A Match Made in Heaven?*, 25 B.C. THIRD WORLD L.J. 475, 489 (2005) (reviewing DAVID SHIPLER, *THE WORKING POOR* (2004)).

93. See Schneider, *supra* note 66, at 498.

94. Kominos, *supra* note 83, at 947.

95. See generally Debra L. Blackwell & Daniel T. Lichter, *Mate Selection Among Married and Cohabiting Couples*, 21 J. FAM. ISSUES 275 (2000) (concluding that married couples are highly homogamous with respect to race and education); Christine R. Schwartz & Robert D. Mare, *Trends in Educational Associative Marriage from 1940 to 2003*, 42 DEMOGRAPHY 621 (2005) (showing that since the 1970s Americans were increasingly likely to marry those with similar educations).

96. See *supra* note 46. According to Barbara Ehrenreich, the idea that we could eliminate poverty with marriage “would not be such a bad idea if we had a lot of CEOs who were willing to marry women in poverty.” Ehrenreich, *supra* note 75, at 419.

97. See Sigle-Rushton & McLanahan, *supra* note 91, at 523.

98. *Id.*

If marriage promotion laws do not “channel” underclass men and women into marriage, should we disregard these laws? If the policy thinking that buoys these laws is demonstrably faulty, might we simply ignore the laws? In general, such dismissive steps would be mistaken because, despite its ineffectiveness and superficiality, marriage promotion performs an important ideological function.

Indeed, if considered in the bright light of day, this ideological function of marriage law for the underclass might be neither a residual nor default function, but rather the most important function. Built on bourgeois assumptions, the marriage promotion programs are most certainly normative. Marriage promotion programs implicitly, and sometimes explicitly, deplore the poor for their lifestyles. The underclass and especially underclass women, this variety of family law suggests, can make the moral and intelligent choice to marry. If they do not make such a choice, they are living in an inappropriate way and are, in effect, responsible for their own poverty. Upstanding Americans need not approve of this easily avoidable, self-imposed poverty, and surely the state should not have to provide financial support.

III. CHILD SUPPORT

The faithful and timely payment of child support is potentially as important to members of the underclass as it is to members of the middle and upper classes. Child support obligations within the underclass, however, are much less likely to be part of complicated divorce negotiations and arrangements. To be sure, members of the underclass divorce in large numbers.⁹⁹ “Today, first marriages are more likely to disrupt in communities with higher male unemployment, lower median family income, higher poverty and higher receipt of welfare.”¹⁰⁰ “The divorce rate among those who live below the poverty line is just about double that of the general population.”¹⁰¹ However, the lack of income and assets makes it unlikely that divorce negotiations will occur, and the majority of underclass divorces are pro se proceedings that resemble administrative processing.

Furthermore, as suggested in the prior section of this Article, large numbers of underclass Americans do not marry in the first place, and their children are not born or raised in the context of marriage.¹⁰² As a result, child support calculations and payments do not take place against the backdrop of divorce. Mothers have custody of almost all underclass children born out of wedlock, and perhaps even more so than divorced custodial parents, a never-married mother would welcome the faithful payment of child support by her child’s father.

But alas, non-custodial parents have hardly distinguished themselves as reliable payors of child support. According to United States Census Bureau

99. Kathleen Mullan Harris, *Family Structure, Poverty and Family Well-Being: An Overview of Panel 2*, 10 EMP. RTS. & EMP. POL’Y J. 45, 57 (2006).

100. *Id.* at 45.

101. *Id.* at 57.

102. EDIN & KEFALAS, *supra* note 50, at 2 (“Having a child while single is three times as common for the poor as for the affluent.”); *see also supra* notes 42-43 and accompanying text.

figures for calendar year 2005, only 46.9% of those legally and officially entitled to child support payments received all of those payments,¹⁰³ and 22.8% received no payments at all.¹⁰⁴ Not surprisingly, census figures do not reference an “underclass,” but the figures do indicate that the parts of the population with characteristics typical of the underclass are the least likely to receive formally ordered child support. The percentage of never-married parents receiving no payments stood at 25.1% and was higher than the percentage of all custodial parents not receiving any payments.¹⁰⁵ A striking 28.8% of custodial parents without high school diplomas received no payments.¹⁰⁶ Most tellingly, 27.4% of those custodial parents with family income below the poverty line received no payments, and an additional 33% received only partial and/or irregular payments.¹⁰⁷ Lawmakers have been inclined to address delinquency problems and, at minimum, to ideologically deplore underclass non-payors.

For decades, state welfare systems have stumbled along trying to address the child support delinquency problem. In all states, delinquent payors can be prosecuted for failure to pay child support or, in extreme cases, for desertion of their children. All states also have enacted some form of the Uniform Reciprocal Enforcement of Support Act, known colloquially as “The Runaway Papa Act.”¹⁰⁸ That law provides a process to thwart payors who flee to another state in hopes of avoiding child support.¹⁰⁹ States also have a range of measures at their disposal for establishing paternity, locating fugitive payors, and enforcing child support orders through civil actions for attachment and garnishment.¹¹⁰

These traditional options and processes notwithstanding, during the 1980s the pursuit of delinquent payors acquired a new animus. The notion of a “deadbeat dad” took hold with pejorative connotations even greater than those attached to the “welfare mom.”¹¹¹ Sporting an alliterative lilt, the phrase “deadbeat dad” suggested indolent, shiftless, and duplicitous men who probably should not have fathered children in the first place. State and local governments began distributing lists and photos of the “Ten Worst Deadbeats,” and law enforcement officials attempted to develop a national “most wanted deadbeats

103. Timothy S. Grall, *Custodial Mothers and Fathers and Their Child Support: 2005*, CURRENT POPULATION REP. 2 (2007), available at <http://www.census.gov/prod/2007pubs/p60-234.pdf>.

104. *Id.*

105. *Id.* at 6.

106. *Id.*

107. *Id.* at 7.

108. See Catherine Wimberly, Note, *Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families*, 53 STAN. L. REV. 729, 735 (2000).

109. *Id.*

110. See Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 261-62 (2000).

111. See *id.* at 263-64.

list.”¹¹² Police departments and prosecutors’ offices conducted pre-dawn raids and round-ups and in some cases led delinquent payors away in handcuffs while television crews captured the moment.¹¹³ Bounty hunters paid with federal money set out after delinquent payors on the run.¹¹⁴

In the courts, prosecutors and judges became more inclined toward punitive treatment of delinquent payors. One observer argued that the willingness of judges to jail delinquent payors made payment strikingly more likely.¹¹⁵ Judges in Genesee County, Michigan, proved especially eager to jail delinquent payors, and their eagerness allegedly resulted in very high rates of payment.¹¹⁶ Judge Fred Hazelwood in Manitowoc County, Wisconsin, took an even more noteworthy step.¹¹⁷ He ordered a “deadbeat dad” *not* to have any more children until he could demonstrate he was supporting the nine children he already had.¹¹⁸ The majority of justices on the Wisconsin Supreme Court signed off on Hazelwood’s order.¹¹⁹

Although an occasional physician or architect might serve as a convenient poster child for the “deadbeat” dad population, it is difficult not to see the campaigns against delinquent payors as part of the condemnation of the welfare system that became increasingly audible during the 1980s. Delinquent and irresponsible payors, the argument went, were agents of poverty. They actually impoverished their children and the mothers of their children and forced these mothers and children to turn to the state for support. What about the many underclass fathers who themselves were born into poverty and are still living in poverty? The building outrage about “deadbeat dads” obscured that reality.

One ambitious ideologue who latched onto the notion that “deadbeat dads” were causing poverty was Joseph Lieberman, then Attorney General of Connecticut. He hurried into print a screed on the need to collect delinquent child support and the ways to do it.¹²⁰ Lieberman asserted that “the failure of delinquent fathers to pay child support is the major reason why more than half the American families that are headed by a woman live below the poverty level.”¹²¹ One chapter in his book discussed “the legal weapons available to

112. See Sandra Evans, *Putting a Face on Deadbeat Dads*, WASH. POST, May 29, 1991, at D1.

113. See Paul Taylor, *Delinquent Dads; When Child Support Lags, ‘Deadbeats’ May Go to Jail*, WASH. POST, Dec. 16, 1990, at A1.

114. See Sarah E. Button, *Bounties on Deadbeat Dads*, MONEY, Mar. 1984, at 202.

115. DAVID L. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 118-19 (1979).

116. *Id.*

117. See David Ray Papke, *State v. Oakley, Deadbeat Dads, and American Poverty*, 26 W. NEW. ENG. L. REV. 9, 15 (2004).

118. *Id.*

119. See *State v. Oakley*, 629 N.W.2d 200, 203 (Wis. 2001). A symposium regarding the case appears at 26 W. NEW ENG. L. REV. 1 (2004).

120. JOSEPH I. LIEBERMAN, CHILD SUPPORT IN AMERICA: PRACTICAL ADVICE FOR NEGOTIATING—AND COLLECTING—A FAIR SETTLEMENT (1986).

121. *Id.* at x.

mothers.”¹²² Lest he seem too warlike, Lieberman also invoked the loving memory of his father Henry Lieberman: “It is altogether fitting that this book about what can be done to force delinquent fathers to support their children be dedicated to a man who was the embodiment of what a responsible father should be.”¹²³

Judge Hazelwood, Lieberman, and others were state and local officials, but national figures also spouted ideological pronouncements casting underclass fathers as disreputable agents of poverty. These figures included Republican Presidents Ronald Reagan, George H.W. Bush, and George W. Bush as well as Democratic President William Clinton. The latter promised to “end welfare as we know it,”¹²⁴ and he did in fact replace the Aid to Families with Dependent Children (AFDC) entitlement with the Temporary Assistance for Needy Families (TANF) program. When President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) into law in 1996, he explicitly linked welfare reform and child support together.¹²⁵ “For a lot of women and children,” Clinton said, “the only reason they’re on welfare today—the only reason—is that the father up and walked away when he could have made a contribution to the welfare of the children.”¹²⁶

The magnitude and range of federal child support legislation enacted since the mid-1980s are striking, especially because family law has traditionally been a state concern rather than a federal matter.¹²⁷ In 1984, Congress enacted a new round of amendments to Title IV-D of the Social Security Act.¹²⁸ Designed to get delinquents to pay up, the amendments directed states to enhance efforts to collect child support by making available employer withholding, liens against property, and deductions from tax refunds.¹²⁹

In 1992, the federal government took even bolder steps to address the problem of unpaid child support. Political leaders on both sides of the

122. *Id.* at 77.

123. *Id.* at v.

124. Presidential candidate William Clinton used this line during his 1992 campaign and also included it in his first State of the Union Address. See Delgado, *supra* note 6, at 908; Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523, 2548 (1995) (outlining liberal and conservative approaches to welfare for children and suggesting a “child support assurance” program). Clinton’s call for the poor to get to work drew robust bipartisan support. See Delgado, *supra* note 6, at 908.

125. See Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, 2 PUB. PAPERS 1325, 1326 (Aug. 22, 1996).

126. *Id.*

127. See Laura W. Morgan, *The Federalization of Child Support; A Shift in the Ruling Paradigm: Child Support as Outside the Contours of “Family Law,”* 16 J. AM. ACAD. MATRIMONY LAW. 195, 195 (1999).

128. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. §§ 651-669 (2006)).

129. 42 U.S.C. § 666 (2006).

aisle—Republican Congressman Henry Hyde and Democratic Congressman Charles Schumer, for example—spearheaded the effort to enact the Child Support Recovery Act (CSRA).¹³⁰ The only opponents of the act were members of the nascent fathers' rights movement.¹³¹ Some of them questioned the assumption that child support delinquency caused poverty and argued that most of the impoverished families headed by unmarried mothers would not be lifted out of poverty even if the delinquent fathers somehow paid their child support.¹³² Having found a convenient whipping boy in the "deadbeat dad," Congress ignored the argument.

The CSRA itself authorized fines and imprisonment for non-custodial parents who owed child support in one state but lived in another.¹³³ However, prosecutions under the CSRA suggested the uselessness of the legislation with regard to obtaining child support from members of the underclass. Between October 1992 and February 1999, federal prosecutions resulted in only 105 convictions.¹³⁴ Most notably for purposes at hand, "none of the CSRA cases brought to trial involve debts owed to single-mother households where the family was 'poor' before the father left the household."¹³⁵ In other words, even though the CSRA could theoretically be used to address problems of delinquent child support in all walks of life, it was not. The great majority of convictions involved well-to-do fathers who were divorced from the mothers of their children and owed large amounts of child support.¹³⁶ Members of the underclass, most of whom had never married the mothers of their children and who had no substantial assets, never really became candidates for prosecution.

Congress might have taken note of the small number of prosecutions and the CSRA's obvious ineffectiveness as a poverty-reducing measure. Instead, Congress decided to stiffen the penalties for offenders who lived in one state and owed child support in another, and in 1998 President William Clinton signed into law the menacingly named Deadbeat Parents Punishment Act (DPPA).¹³⁷ It amended the CSRA, made offenses under the Act into felonies, and provided that certain offenders could be imprisoned for up to two years.¹³⁸ The DPPA also created the rather remarkable presumption, at least for members of the underclass, that a delinquent payor is able to pay child support.¹³⁹

130. Child Support Recovery Act of 1992, Pub. L. No. 105-521, 106 Stat. 3403 (codified as amended at 18 U.S.C. § 228 (2006)).

131. See Wimberly, *supra* note 108, at 739 (discussing the opposition of the Wisconsin Fathers for Equal Justice to the CSRA).

132. *Id.*

133. 18 U.S.C. § 228(c) (2006).

134. Wimberly, *supra* note 108, at 740.

135. *Id.* at 743.

136. See *id.*

137. Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (codified as amended at 18 U.S.C. § 228 (2006)).

138. See Wimberly, *supra* note 108, at 746.

139. 18 U.S.C. § 228(b) (2006).

In addition to criminalizing child support delinquency, the federal government addressed child support through PRWORA.¹⁴⁰ Mainstream commentaries have stressed the way the legislation replaced welfare entitlements with various state-designed “welfare-to-work” schemes.¹⁴¹ Sometimes commentaries overlook PRWORA’s mandate that states take measures to increase child support collection in order to qualify for federal block grants. The measures include, but are not limited to, in-hospital paternity determination, faster courtroom paternity proceedings, state-wide registration of delinquent payors, and the denial of licenses to drive, hunt, and engage in assorted occupations and professional practices.¹⁴² According to one commentator, the new legislation was supposed to make the collection of child support “automatic and inescapable—‘like death and taxes.’”¹⁴³

Have the more aggressive child support collection measures enacted and undertaken since the mid-1980s made payors more faithful to their responsibilities? On the one hand, some progress has been made, and the lives of some custodial mothers and their children have been made easier. Law, in this sense, has functioned to bring some parents the payments to which, on behalf of their children, they are entitled. On the other hand, almost all of the success has been with middle and upper class families and not within the underclass.¹⁴⁴

Lacking significant effectiveness among the poor, the “deadbeat dad” laws have only a negligible impact on poverty. According to Paul K. Legler, “By itself collecting child support is not a solution to the problem of poverty in single parent families. . . . If policymakers expect the changes in child support policy to substitute for cuts in welfare expenditures, they will have sorely missed the boat.”¹⁴⁵

None of this means that child support collection laws and processes have ceased to be “law” for the underclass. As was the case with the pro-marriage legislation and initiatives considered in the previous section of this Article, child support collection laws and processes rest on debatable assumptions and speak normatively. In the eyes of those comfortable Americans who promoted the new laws and processes, the poor not only fail to respect the institution of marriage but also fail to satisfactorily support their children. Those who support these aggressive child support laws honestly believe that the presumed failure of the underclass to support their children is wrong and un-American. Members of the underclass can be deplored and vilified even if we do not effectively police them. “Law,” in this sense, is a bourgeois ideological construct.

140. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

141. See Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 123 (2002).

142. See Brito, *supra* note 110, at 256-62.

143. See Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 538 (1996).

144. See Wimberly, *supra* note 108, at 743.

145. Legler, *supra* note 143, at 538.

IV. ADOPTION

Commentators on adoption often conceptualize the legal process as “triangular,” that is, as involving three types of parties: biological parents, adoptive parents, and children.¹⁴⁶ However, there is an even more fundamental feature of adoption, one that is grounded in class. For the most part, “have-nots” relinquish children to “haves.” In a majority of adoptions, the “have-nots” are members of the underclass, and children leave the homes of these biological parents to become children of their middle and upper-class adoptive parents. The class-related nature of the process is manifest for most domestic adoptions and also for the growing number of inter-country adoptions.¹⁴⁷

This class imbalance helps explain why biological parents often experience and recall adoptions differently than do adoptive parents. For the latter, adoption is usually a wonderful development, and adoptive parents customarily feel proud and enriched. Underclass parents, by contrast, sometimes experience adoption in a daze, and they might recall the experience with regret and a great sense of loss. It is hard to believe, the underclass biological parent might reflect, but I was not financially stable enough to hold onto my own flesh and blood. Other underclass parents are more clear-headed when placing children for adoption, but they might feel guilty that they chose to place children for adoption in order to avoid exacerbating their poverty or becoming dependent on the children’s fathers.¹⁴⁸ Adoption law as an ideological construct encourages underclass biological parents to think of themselves as failures.

The role of the underclass as the most important “supplier” of adoptable children became clear during the post-World War II decades, roughly the same time the modern underclass emerged. Between the end of the War and 1970, the number of American adoptions jumped more than threefold from approximately 50,000 to 175,000 annually.¹⁴⁹ Although in earlier eras the most sought-after adoptees might have been young adults who could perform work on family farms

146. See generally BARBARA MELOSH, *STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION* (2002) (discussing a study that finds adoption a success story for all three groups).

147. See Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 102 (1998) (“One troubling aspect of both transracial and international adoptions is that each often results in the transfer of children from the least advantaged women to the most advantaged.”).

148. Maureen A. Sweeney, who as a college student placed a child for adoption, at first understood her decision in terms of her child’s welfare but then realized self-interest played a role. “After time and reflection,” she writes, “I believe within that genuine desire for my son was also a desire for myself. I knew that if I kept him I would probably marry his father (who had in the weeks before the birth become the one pushing for marriage), and my instincts were clamoring that this would be a disastrous move for me.” Maureen A. Sweeney, *Between Sorrow and Happy Endings: A New Paradigm of Adoption*, 2 YALE J.L. & FEMINISM 329, 332 (1990).

149. See Kathy S. Stolley, *Statistics on Adoption in the United States*, in *FAMILY LAW IN ACTION—A READER* 105, 106 (Margaret F. Brinig et al. eds., 1999).

or in family businesses, infants and toddlers became the preferred adoptees during the adoption boom.¹⁵⁰ Adoptive parents were willing to expend substantial amounts for healthy youngsters.¹⁵¹ Sociologist Vivian Zelizer calls this the “sentimentalization of adoption,”¹⁵² and she speaks of the often poignant efforts of middle and upper-class Americans to find “the priceless child.”¹⁵³

As the demand for adoptees came to exceed the number of available children, earlier attempts to “match” the ethnicity or race of the child with the ethnicity or race of the adoptive parents fell by the wayside.¹⁵⁴ It no longer seemed like much of a problem if Norwegian-looking parents adopted a Greek-looking infant. It also became acceptable for Caucasians to adopt Native American and African American children. According to Elizabeth Bartholet, the Civil Rights Movement of the 1960s helped prompt transracial adoption by highlighting the plight of many minority children and by calling for integration.¹⁵⁵ “This movement’s integrationist ideology made transracial adoption a sympathetic idea to many adoption workers and prospective parents.”¹⁵⁶

Some complained about transracial adoptions,¹⁵⁷ but adoption across race became more and more common as the twentieth century limped to a finish. This development was significant for the underclass because, as noted earlier, members of minority groups and especially African Americans constitute a large, disproportionate percentage of the underclass.¹⁵⁸ When commentators addressed adoption across race, they often unreflectively discussed the adoption of African American underclass children by members of the Caucasian middle and upper classes. Adopted children in most cases move from a poorer, less stable socioeconomic setting to a more prosperous and stable one. Some commentators

150. A Minnesota study revealed that the average age of adoptees dropped from 24.61 months between 1900 to 1917 to 6.89 months between 1917 to 1927. See Alice M. Leahy, *A Study of Certain Selective Factors Influencing Prediction of the Mental State of Adopted Children*, 41 J. GENETIC PSYCH. 294, 300 (1932).

151. See VIVIAN A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 193 (1981).

152. See *id.* at 169-71.

153. See *id.* at 193.

154. See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1178 (1991).

155. See *id.*

156. *Id.*

157. See generally James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487 (1987-88) (arguing that children best develop racial identity in same-race families); Asher D. Isaacs, *Interracial Adoption: Permanent Placement and Racial Identity—an Adoptee’s Perspective*, 14 NAT’L BLACK L.J. 126 (1995) (discussing the national need to develop racial identity); Marlon N. Yarbrough, *Trans-Racial Adoption: The Genesis or Genocide of Minority Cultural Existence*, 15 S.U. L. REV. 353 (1988) (concluding that the use of race in adoptions should be encouraged).

158. See *supra* notes 3-6 and accompanying text.

use this very socioeconomic “cross-over” to counter those opposed to transracial adoption.¹⁵⁹ In Bartholet’s condescending words, “We should not romanticize about what it is like to live on the social and economic margins of society.”¹⁶⁰

In general, legal institutions, standards, and processes greatly facilitated these adoptions. County welfare departments, non-profit agencies, and private attorneys are the chief coordinators of adoptions.¹⁶¹ Adoptions coordinated by private attorneys have become the most rapidly growing variety of adoption.¹⁶² When private adoption attorneys are in charge of managing and coordinating adoptions, middle and upper-class parents, the attorneys’ clients, are most able to have their preferences accommodated.¹⁶³ County welfare departments and non-profit adoption agencies must balance demands from struggling biological families, state bureaucrats, and organized religious groups; their efforts are less clearly “client-driven.”¹⁶⁴

When attorneys file adoption petitions on behalf of their middle and upper-class clients with the appropriate court, the standard proceedings include obtaining consent from biological parents and a judicial consideration of whether the adoption is in the best interests of the child. With regard to both of these matters, those seeking to adopt have substantial advantages. The controlling approaches and standards help adoptions move forward to finalization. American law, in a sense, wants middle and upper-class Americans to be able to adopt the available children of the underclass.

The law’s approach to consent from the biological parents is especially revealing. Consents from underclass biological mothers are obtained early and easily, and they are difficult to challenge at a later point in time even if the poor and poorly educated biological mothers consented hastily.¹⁶⁵ Courts usually require traditional varieties of fraud or duress before they are willing to invalidate a biological mother’s consent.¹⁶⁶ Consent prompted by immaturity, financial desperation, or pressure from parents and lovers does not constitute fraud or duress.¹⁶⁷

Consents from underclass biological fathers, meanwhile, can be exceedingly problematic. As noted in an earlier section of this Article, these fathers are in many cases not married to the mothers of the children placed for adoption.¹⁶⁸

159. See Bartholet, *supra* note 154, at 1207.

160. *Id.*

161. See David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 471-72 (1999).

162. See Susan A. Munson, *Independent Adoption: In Whose Best Interest?* 26 SETON HALL L. REV. 803, 811-16 (1996); Papke, *supra* note 161, at 471-72.

163. Papke, *supra* note 161, at 471.

164. *Id.*

165. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 936 (2d ed. 1988).

166. See *id.*

167. See, e.g., *In re J.M.P.* 528 So. 2d 1002, 1009 (La. 1988).

168. See *supra* notes 41-43 and accompanying text.

Frequently, fathers do not live with the biological mothers of their children, and the whereabouts of some biological fathers are unknown. How might adoptive parents and their lawyers obtain consent from these men? States routinely authorize constructive notice to these fathers in legal publications with which the fathers could not possibly be familiar. Most states have also established so-called “putative fathers’ registries.”¹⁶⁹ Men who know or suspect they have fathered a child can place their names in the registries and then be notified if and when the child they think is theirs is placed for adoption. However, if a man fails to register, he waives his rights to notice, hearing, and consent.¹⁷⁰ Many underclass fathers, of course, lack the means, mobility, and confidence to register, and most are unaware of the registries.

The adoption finalization decree, couched with reference to “the best interests of the child,” also favors the middle and upper-class adoptive parents over the underclass parents who relinquished or were forced to relinquish their children. “Best interests” in the context of adoption is not the same as “best interests” when two parents are battling for child custody at the time of divorce. In the latter, the judge might weigh the strengths and weaknesses of one parent against those of the other in hopes of placing the child in the most nurturing home. In the adoption context, by contrast, the judge is not really choosing between options. The biological parent or parents have placed the child for adoption, a caseworker has studied the files and the home of the adoptive parents, and a government department or non-profit agency has lent its support. The determination at this point in the process that the adoption is in “the best interests of the child” is, for all intents and purposes, a foregone conclusion. Underclass parents or, in most cases, unmarried underclass mothers could not hope to successfully argue that they should keep their children or that parents other than those who filed the adoption petition would be better picks.

How might one rationalize the frequent and routine adoption of underclass children by members of the middle and upper classes and the bias on behalf of the latter in the standard adoption proceeding? The indefatigable judge and “law and economics” scholar Richard Posner perceived the fundamental rules of the market economy asserting or at least attempting to assert themselves.¹⁷¹ He urged that the market be even further cut loose to get babies whose parents were willing to place them for adoption into the hands of those most willing to adopt them.¹⁷² Posner’s proposals drew criticism,¹⁷³ and Posner, never shy about pimping for the

169. See generally Diane S. Kaplan, *The Baby Richard Amendments and the Law of Unintended Consequences*, 22 CHILDREN’S LEGAL RTS. J., Winter 2002-2003, at 2 (discussing putative father registries); Donna L. Moore, *Implementing a National Putative Father Registry by Utilizing Existing Federal/State Collaborative Databases*, 36 J. MARSHALL L. REV. 1033 (2003) (advocating for a federal putative father registry).

170. Moore, *supra* note 169, at 1034.

171. See Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324 (1978).

172. See *id.*

173. See Tamar Frankel & Francis H. Miller, *The Inapplicability of Market Theory to*

well-to-do and the glories of the market economy, responded with one of his typically prickly retorts.¹⁷⁴

While Posner's proposals failed to catch hold, a more copasetic rationalization for the adoption of underclass children by the middle and upper classes involved a deep-seated disrespect for underclass family life. As Gilbert A. Holmes pointed out, the process of American adoption incorporates a clear preference for the bourgeois nuclear family.¹⁷⁵ The law takes underclass families to be inferior, and "[u]nder nuclear family-based adoption policy, the law terminates the birth parents' rights before it engrafts parental rights in the adoptive parents."¹⁷⁶ When children then move to bourgeois nuclear families, the law assumes that this move must be good for the children.

To a large extent, these preferences grow out of a larger set of assumptions regarding parenting and especially mothering. Most members of the middle and upper classes hold dear a model of exclusive motherhood.¹⁷⁷ This intense style of mothering first appeared in Europe, and Freud critiqued it as early as the turn of the twentieth century.¹⁷⁸ Exclusive mothering and a related normative attitude regarding it reappeared in the United States in the 1950s and '60s,¹⁷⁹ and despite the many changes in women's condition since then, the model still has sway. Even though the majority of middle and upper-class mothers now work outside the home,¹⁸⁰ many mothers' sense of what is required for good mothering remains traditional. The proverbial "Super Mom" somehow finds a way to devote extraordinary amounts of time to her children.

In her now-classic feminist scholarship, Nancy Chodorow pointed out that the intense, exclusive style of mothering accepted by middle and upper-class Caucasians derives from "a socially and historically specific mother-child relationship."¹⁸¹ For many members of the underclass, by contrast, financial necessities and subcultural norms lead parents to share child-rearing

Adoptions, 67 B.U. L. REV. 99 (1987); J. Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341 (1984); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

174. Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987).

175. See Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1674 (1995).

176. *Id.* at 1653.

177. See Melanie Nicholson, *Without Their Children: Rethinking Motherhood Among Transnational Migrant Women*, SOC. TEXT, Fall 2006, at 13, 15-16.

178. See *id.*

179. See *id.*

180. Approximately 75% of women between twenty-five and fifty-four either work outside the home or are actively seeking employment. See Eduardo Porter, *Women in Workplace—Trend Is Reversing*, S.F. CHRON., Mar. 2, 2006, at A2.

181. NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 76 (1978).

responsibilities with others, often within extended families.¹⁸² This approach is most evident among African Americans, but it extends to underclass Hispanics, Native Americans, and Caucasians as well. Rayna Rapp studied mothering styles and family structures among the poor in American cities and found “there is a tremendous sharing of the children themselves.”¹⁸³

Those committed to exclusive mothering give the underclass community approach low scores. Some spokesmen for the dominant classes aggressively deplore the ways the underclass raises its children along with the lifestyles of the underclass in general.¹⁸⁴ Adopting underclass children could, as a result, seem an altruistic, even noble undertaking. Friends and relatives of adoptive parents often praise them for “saving” underclass children, and some adoptive parents proudly think of themselves as child-rescuers.¹⁸⁵

Attitudes of this sort dwell not only within actual adoption processes and procedures but also in the culture as a whole. The cultural bias both prompts and reinforces the biases within the law regarding underclass parenting and the adoption of underclass children by middle and upper-class parents. This prompting and reinforcement are evident in a wide range of cultural expression.

Hollywood cinema, for example, should never be underestimated as an ideological organ. The cinema is, to quote from film theorist Robert B. Ray, “one of the most potent ideological tools ever constructed.”¹⁸⁶ Films customarily speak in a highly normative way, and the failure or unwillingness of viewers to perceive this normativity only contributes to its power.¹⁸⁷ “Any stable society will be organised around a preferred self-image. . . . The function of this representation is to reproduce its own conditions of existence, in other words to protect the status quo.”¹⁸⁸

One example of a contemporary adoption film that incorporates a bias against underclass parenting and families is the much-praised and star-laden *Losing Isaiah*.¹⁸⁹ Scholars criticized the film for its negative portrayal of African American mothering,¹⁹⁰ but Khaila Richards, the film’s biological mother, is as

182. See generally ELMER P. MARTIN & JOANNE MITCHELL MARTIN, *THE BLACK EXTENDED FAMILY* (1978); DAVID M. SCHNEIDER & RAYMOND T. SMITH, *CLASS DIFFERENCES IN AMERICAN KINSHIP* (1978).

183. Rayna Rapp, *Family and Class in Contemporary America: Notes Toward an Understanding of Ideology*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 168, 177 (Barrie Thorne & Marilyn Yalom eds., 1985).

184. Twila L. Perry notes that “children transferred from devalued women to valued women are deemed to have received a lucky break.” Perry, *supra* note 147, at 121.

185. See *id.*

186. ROBERT B. RAY, *A CERTAIN TENDENCY OF THE HOLLYWOOD CINEMA, 1930-1980*, at 55 (1985).

187. See *id.* at 54-55.

188. MIKE CORMACK, *IDEOLOGY AND CINEMATOGRAPHY IN HOLLYWOOD, 1930-39*, at 9 (1994).

189. *LOSING ISAIAH* (Paramount 1995).

190. See Perry, *supra* note 147, at 123-24.

much a member of the underclass as she is an African American. Here, as is often the case in the dominant culture, race serves as a convenient marker for socioeconomic class.

In the film, the Richards character, played by Halle Berry, conceived Isaiah during sex-for-drugs intercourse, but she is hardly prepared to be his mother. Young, addicted, and looking for more drugs, she leaves Isaiah on a trash can. Fortunately, sanitation workers find him and race him to a hospital. At the hospital, a social worker named Margaret Lewin, played by Jessica Lange, helps Isaiah through his crack-related difficulties, and then she and her husband Charles, played by David Straithairn, adopt him. But alas, a rehabilitated Richards appears wanting her son back. A series of wrenching personal exchanges among the characters follow, as do tortuous courtroom proceedings.

Through it all, viewers are invited to side with the Lewins and to reject both Richards's attempts to regain her son and Richards herself. We are horrified when the judge grants Richards custody. We flinch when Richards tries to get Isaiah to eat french fries, gives him a baseball cap he can wear backwards, and dumps him in daycare. And we understand when Isaiah pitches a fit and cries for his "Mommy," that is, Margaret Lewin. Toward the end of the film, Richards' frustrations drive her to the brink of child abuse, and we are immensely relieved when she turns to Margaret Lewin for help. It has been obvious to us at every turn that the bourgeois Lewin would certainly be a better parent than the underclass Richards.

Whenever middle or upper-class adoptive parents are available and willing, law, popular culture, and the dominant culture in general tell us these would-be parents should be allowed to adopt the children of the underclass. According to the dominant ideology, underclass children are poised on the junk heap of life. Their homes are unstable and perhaps unhealthy, and their biological parents do a lousy job of parenting. The children will have their best chance to thrive if they move from their scrambled, underclass families to stable, bourgeois families typical of the American mainstream.

CONCLUSION

Family law for the underclass is not *sui generis*. It performs many of the same functions family law performs for the middle and upper classes. It sometimes channels men and women into marriage. It sometimes helps parents obtain the child support to which their children are entitled. And it sometimes places children in loving, nurturing adoptive homes. Political leaders, legislators, and judges would in most cases be pleased by family law's ability to function in these ways, although these government officials might also acknowledge that family law's effectiveness with regard to these functions is limited, especially for the poor.

In addition, family law for the underclass assumes an ideological function. Buoyed by other ideological pronouncements in the form of political speeches, religious sermons, and mainstream popular culture, family law implicitly and, in some instances, explicitly censures the underclass for the way it lives its collective life. In particular, marriage promotion laws criticize the underclass for

its failure to marry and for its disrespect for the very institution of marriage. “Deadbeat dad” legislation deplores underclass fathers for failing to pay child support and for ignoring the resulting plight of their children and the mothers of those children. Adoption law rejects the way underclass parents raise their children and is prepared whenever possible to move those children into bourgeois adoptive homes. In all of these areas, family law for the underclass suggests underclass values and conduct—and not the denial of meaningful employment, educational opportunity, and residential mobility—deposit and keep the underclass in poverty.

The capacity of family law to function ideologically merits underscoring. Family law for the underclass plays a major role in designating members of the underclass as “outsiders” in the United States. Family law for the underclass suggests the underclass is a problem in and of itself rather than a sector of the population unjustly deprived of the material and social sustenance their society provides others. In performing this ideological function, family law for the underclass consigns impoverished Americans to their undesirable situation and, indeed, helps perpetuate the contemporary American class structure.